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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

KEITH DEAN and CORNELIUS HARPER,
Petitioners,
v.

JACK DUCKWORTH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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56 pp

QUESTIONS PRESENTED

In 1977, fourteen-year-old Keith Dean and 15-year-old Cornelius Harper were accused of a rape, robbery, and kidnapping, which they did not commit. They were convicted in a joint trial in 1979 at which time a single attorney represented both children. They were convicted solely on the basis of the victim's eyewitness identification without any corroborating evidence, direct or circumstantial. After appealing through the Indiana State Court system, the Petitioners filed a federal habeas corpus action pursuant to Section 2254 and the District Court granted relief based upon a finding of an actual conflict of interest by the attorney who represented both Dean and Harper. On July 31, 1984, the Seventh Circuit Court of Appeals reversed the district judge's grant of habeas corpus relief.

1.

In a case of multiple representation, did the Seventh Circuit err in finding "no evidence of any actual conflict of interest" where, prior to trial defense counsel had reason to believe that one defendant had no knowledge of the offense and the other had "some" knowledge of the offense?

2.

Is the likelihood of guilt or innocence a factor to be considered in a §2254 habeas corpus case?

3.

Were the petitioners denied their right to a speedy trial by a seventeen month delay between arrest and trial, during which time the petitioners actually grew up into the size and weight of the victim's description of her assailants?

4.

Regarding the denial of the speedy trial claim, did the Seventh Circuit err in relying on the childrens' "knowledge" of the delays, where there is no evidence that they had been informed of their constitutional right to a speedy trial nor knowingly and voluntarily waived same?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioners, Keith Dean and Cornelius Harper, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered

in this proceeding on July 31, 1984.

OPINION BELOW

The opinion of the Court of Appeals is unreported as of this date. A copy of the Seventh Circuit Court of Appeals' slip opinion is attached to this petition as Appendix "A". The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported and is attached to this petition as Appendix B. The District Court opinion is reported at 559 F.Supp. 1331 (N.D.Ind. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1984. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc was issued on October 22, 1984.

This petition is timely filed within

sixty (60) days of October 22, 1984. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution states in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioners are in general agreement with the statement of facts included in the Seventh Circuit Opinion. Much of the following is a verbatim extract of the Seventh Circuit findings of fact.

During the early morning hours on September 13, 1977, Lanann Sulkko, a 29-year-old white woman, was abducted from her driveway at gunpoint by two Black males. She was driven some distance from her home and then raped in the back seat of what turned out to be an automobile stolen during the evening hours of September 12, 1977. She was robbed of her money and returned to an area near her house.

In the course of the subsequent police investigation, Ms. Sulkko described her assailants as around 17-20

years of age and between five feet six inches and five feet seven inches in height. Ms. Sulkko was also shown a number of mug shots as well as photographs from three local high school yearbooks. She picked Richard Pickett and Larry Harper as individuals who possessed characteristics or features similar to those of her attackers and she picked five-foot one inch Keith Dean and five-foot four inch Cornelius Harper, younger brother of Larry Harper, as actually portraying the attackers. No identification lineup was ever conducted although Ms. Sulkko did view and identify the Petitioners at a juvenile hearing. The Petitioners were the only Black males in the room at the time.

From the commencement of the proceedings against Keith Dean and Cornelius Harper, both were represented

by the same attorney. After their arrest, at the request of their defense attorney, the Petitioners each submitted to an ex parte polygraph examination. The results indicated that Cornelius Harper might have known something about the incident. The polygraph examination did not indicate that Keith Dean knew anything about the incident.

Keith Dean and Cornelius Harper were maintained in jail without bond for the ensuing 17 months until they were brought to trial on April 30, 1979. Both continued to be represented by the same attorney. They were found guilty and sentenced to life imprisonment, which at that time was a mandatory sentence for the crime of kidnapping under Indiana law.

Shortly after the conviction, Richard Pickett and Larry Harper told

defense counsel that the Petitioners were not guilty and that they were the individuals involved in the incident. They admitted stealing the car, admitted having sex with Ms. Sulkko, but stated that the sex was consensual.

Present counsel became involved in the case at this point. All four individuals were given polygraph examinations by separate polygraph examiners at John Reid & Associates in Chicago, Illinois. The results of those examinations indicated that Keith Dean and Cornelius Harper were telling the truth when they stated they had not engaged in sexual intercourse with Ms. Sulkko. The independent examinations of Larry Harper and Richard Pickett indicated they were telling the truth when they stated they had been with Ms. Sulkko on September 13, 1977, telling the

truth when they stated they had had sexual intercourse with Ms. Sulkko, and that they were not telling the truth when they stated it was not by force.

Based upon the above information and extensive interviews with all four individuals, present counsel filed a Motion to Correct Errors in the Indiana State Court. Attached to the motion was a transcript of Richard Pickett's and Larry Harper's statements as given to prior counsel. At the hearing on the motion, Larry Harper testified that he had engaged in sexual intercourse with Ms. Sulkko but refused to answer many questions on Fifth Amendment grounds. Richard Pickett refused to answer any questions. Larry Harper did state he had told his brother about the incident the day after it happened.

The trial judge denied the motion

based upon the fact that Petitioners had failed to produce "newly-discovered evidence." Additionally, the judge noted that under Indiana law, the results of the polygraph examinations were inadmissible absent a stipulation between the parties. Petitioners then appealed directly to the Supreme Court of Indiana which affirmed the convictions in Dean v. State, 433 N.E.2d 1174 (1982).

Having exhausted their available state court remedies, Petitioners filed a petition for habeas corpus relief in the federal district court. Nine issues were raised in the petition. The district court ruled that eight issues were "wholly without merit," and then addressed the lone issue of whether the joint representation of the Petitioners at trial violated their right to the effective assistance of counsel. After

reviewing the record, the district court reached the conclusion that Petitioners' counsel had an actual conflict of interest that adversely affected his performance and therefore issued the writ.

The district court stated:

> Without passing on the question of whether the timing of the theft of the station wagon used in the assault is central to the Petitioners' alibi defense, the fact remains that no joint defense, alibi or otherwise, existed as to what occurred in the critical morning hours of September 13, 1977. Thus, with the destruction of the joint alibi defense relating to the evening hours of September 12, 1977, it became immediately apparent that aside from their mutual desire to be acquitted, the interests of the Petitioners were not identical. For example, while it is not for this court to determine the validity, reliability, or even admissibility of the polygraph examinatons administered in this case, the fact that defense counsel had each of

the petitioners undergo such tests prior to trial, and the results were inconsistent, indicated a strong likelihood that it would have been in the best interest of at least one of the Petitioners to subject his co-defendant to a rigorous cross-examination of that individual's knowledge of the events of September 12,13, 1977. Because both Petitioners were represented by the same attorney at trial, however, no such examination was possible without undermining the rule that one's attorney must be "devoted solely to the interest of his client." United States ex rel. Hart v. Davenport, 478 F.2d 203, 109 (3rd Cir. 1973). 559 F.Supp. 1331, at 1334.[1]

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[1]The finding that the defenses were not joint is actually supported by the Indiana Supreme Court opinion, Dean v. State, supra at 1176, wherein the Supreme Court of Indiana states that "at trial defendants presented different alibi defenses. They point to a difference in the strengths of those defenses. Prior to trial a polygraph examination indicated that one defendant knew something about the incident and the other did not."

The respondent appealed from the district court's grant of relief and the circuit court addressed two issues. After reviewing the facts of the case the Seventh Circuit rejected the Indiana Supreme Court and District Court's conclusion that the Petitioners did not have a joint defense. "In short, we find no evidence of any actual conflict of interest or any adverse effect upon trial counsel's performance." (slip op. p.6).

Regarding the speedy trial issue, the Seventh Circuit acknowledged the lengthy delay and the fact that the Petitioners grew up into the size of the assailants as originally described by Ms. Sulkko. However, the Circuit Court rejected the speedy trial claim based upon their conclusion that the Petitioners never asserted their right and that the delays and continuances were

had with their knowledge and at their attorney's request and that such facts outweigh any possible prejudice created by the delay.

Petitioners filed a motion for rehearing and suggestion for rehearing en banc to the Seventh Circuit Court of Appeals. In that motion the Petitioners pointed out that the Seventh Circuit failed to take into proper consideration the extremely strong showing of innocence made by the Petitioners and the fact that there was no adequate showing on the record that the Defendants had been informed of their right to a speedy trial and had knowingly and voluntarily given up that right. The motion for rehearing and suggestion for rehearing en banc were denied on October 22, 1984.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Decision Reversing The Court's Finding of An Actual Conflict of Interest and Finding "No Evidence" of An Actual Conflict is Contrary to the Evidence and the Jurisprudence of this Court

The Indiana Supreme Court found that, "at trial Defendants presented different alibi defenses," and that, "prior to trial a polygraph examination indicated that one Defendant knew something about the incident and the other did not." Dean v. State, 433 N.E.2d at 1176.

The district court concluded that the Petitioners' defenses were different and that an actual conflict existed. The district court pointed to two important facts. First, the polygraph examinations, administered to each defendant prior to their original state

court trial, were different and showed that one of the Defendants might have some knowledge concerning the case. This raised an actual conflict in that counsel was prevented from rigorously cross-examining and attacking the defendant who had some knowledge of the case.

Second, part of the defense for each defendant involved a joint alibi resting upon an important date in Petitioner Cornelius Harper's life at school. As noted by the district court, "with the destruction of the joint alibi defense relating to the evening hours of September 12, 1977, it became immediately apparent that aside from their mutual desire to be acquitted, the interests of the Petitioners were not identical." Dean v. Duckworth, supra at 1334.

The Seventh Circuit simply rejected these findings.

This Court has recognized that in a conflict of interest situation caused by multiple representation, it is often difficult to see the conflict of interest because that conflict may be manifested by a failure to act on behalf of one of the clients rather than an affirmative error clear on the face of the record. In Holloway v. Arkansas, 435 U.S. 475, 490-91, 98 S.Ct. 1173 1181 (1978), the court stated that:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one

> client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.

This is reiterated in that case's dissenting opinion by three justices. Mr. Justice Powell stated that:

> I agree that the State's burden is not met simply by the assertion that the defenses of petitioners were not mutually inconsistent, for that is not an infrequent consequence of improper, joint representation. 435 U.S. at 497, 98 S.Ct. at 1184.

The same principle, applicable to this case, was voiced by the Fifth Circuit Court of Appeals in Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir.

1975):

> The State's analysis fails to appreciate that the conflict occurred not in presenting the defense chosen by appointed counsel, but in selecting defenses and strategies in the first place.
>
> ...Counsel's choice of the "united we stand, divided we fall" defense was not a free choice of strategy. It was the only course open to an attorney with the unenviable task of saving two boys from the electric chair.
>
> It must be remembered that in cases involving conflicts of interest, the conflict does not always appear full-blown upon the record, since counsel may throughout endeavor to reconcile the conflict. 516 F.2d at 1079.

See, also, Glasser v. United States, 315 U.S. 60, 72-75, 62 S.Ct. 457, 465-67 (1942), wherein the record showed defense counsel failed to cross-examine a prosecution witness whose testimony linked the defendant with the crime and failed to resist the presentation of

arguably inadmissible evidence.

Petitioners assert that the Seventh Circuit Court of Appeals did not appreciate or weigh the actual conflict of interest which existed in this case. The district court acknowledged that it was a close question but, considering the strong evidence of innocence and wrongful conviction, the Seventh Circuit incorrectly reversed the district court decision.

II.

The Seventh Circuit Failed to Take Into Consideration the Strong Showing That Petitioners Are Not Guilty of the Crime for Which They Were Convicted.[2]

An important common thread which binds this Court's conflict of interest cases is the Court's perception regarding the innocence or guilt of the defendant.

In Glasser v. United States, supra at 67, 62 S.Ct. at 463, this Court stated:

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[2]If permitted to do so by the ethics of the profession, counsel for the Petitioners would have no hesitancy to inform the Court that they have represented the Petitioners from shortly after the time of their conviction, that they have interviewed all of the pertinent parties in the case, that they have handled hundreds of felony cases in the past, and that this is the only significant felony case in which counsel would state, as officers of the Court, that they absolutely believe that the Petitioners are not guilty.

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided a slight impetus which swung the scales toward guilt.

This language is reiterated in Holloway v. Arkansas, supra, at 489, 98 S.Ct. at 1180. Further, in Cuyler v. Sullivan, 446 U.S. 335, 337, 100 S.Ct. 1708, 1712 (1980), the court noted that the evidence against (Sullivan) was entirely circumstantial.

The question of guilt or innocence has increasingly become a focus of concern in Section 2254 habeas corpus cases.

In his dissent to Kaufman v. United

States, 394 U.S. 217, 235, 236 (1969), Justice Hugo Black stated that:

> ...The defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant.

This thesis was advanced in Judge Henry J. Friendly's article, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgment," 38 U.Chi.L.Rev., 142 (1970) and was most recently reiterated by Chief Justice Burger in a statement concerning the denial of certiorari in Spaulding v. Aiken, 103 S.Ct. 1795, 1797 (1983). The chief justice, in discussing the cost of habeas corpus on society, emphasized the need for habeas corpus review "where the petitioner can make a colorable claim of innocence... ."

In the present case, the district

judge was obviously impressed with the likelihood of the Petitioners' innocence. He stated that, "The record seems almost to cry out that a grave injustice may have been done." 559 F.Supp. at 1336.

The present case presents compelling reasons for considering the great likelihood that the Petitioners are not guilty of the crime for which they were convicted. First, besides such an affirmative showing of innocence, it must be remembered that the State's case rests entirely upon the eyewitness identification of the victim with absolutely no supporting evidence, direct or circumstantial. Secondly, the Petitioners, 14 and 15 years of age at the time of the alleged offense, will stand committed to incarceration for the rest of their natural lives if their

conviction is upheld.[3]

This case presents the court with an opportunity to rule on two important issues. First, whether the Seventh Circuit erred in failing to consider the strong evidence of innocence and the liberty interest associated with life sentences. In the alternative, this case presents the Court with an opportunity to elaborate on the role the question of guilt or innocence plays in the

---

[3]The record indicates that the Petitioners remained incarcerated for the 17 months prior to their state court trial. Once present counsel became involved in the case, shortly after the conviction, counsel were able to have the Petitioners released on bond. The Petitioners have been on bond for most of the period between 1979 and the present. Keith Dean is currently married and employed and Cornelius Harper is employed in Chicago, Illinois. At the present time, a motion to revoke their bond is pending before the District Court.

consideration of §2254 habeas corpus cases. The Court has not previously addressed this question and this case presents a compelling factual setting for elaboration.

At minimum, Petitioners respectfully request that the case be remanded to the Seventh Circuit for reconsideration in light of the strong evidence that the Petitioners are innocent.

III.

The Seventh Circuit Had No Basis for its Implicit Findings that the Petitioners Waived, or Acquiesced in the Denial of Their Speedy Trial Rights

Even though the District Court did not address the particular merits of the Petitioners' speedy trial claim, the Seventh Circuit discussed the merits of that claim.

The crucial finding by the Seventh Circuit is in the following paragraph:

> In our opinion, the fact that Petitioners never asserted their right and that the delays and continuances were had with their knowledge and at their attorney's request, outweighs any possible prejudice created by the delay. In this regard, we note that the prejudice was minimized by defense counsel when he had the Petitioners' heights measured shortly after their incarceration. (slip op. 7).

Implicit in this judgment is a finding that the Petitioners, age 14 and 15, had been informed of their rights to a speedy trial and had knowingly and intelligently waived same. Since there is no factual basis for such a conclusion anywhere in the record of this case, the Seventh Circuit opinion must be vacated and, at minimum, the case remanded for such a determination.

This Court has consistently held that a waiver of constitutional rights cannot be presumed from a silent

record. Barker v. Wingo, 407 U.S. 514, 525, 92 S.Ct. 2182, 2189 (1972), and that waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). The court should "indulge every reasonable presumption against waiver," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812 (1937), as quoted in Barker v. Wingo, supra, at 525. The principles are specifically applied to the speedy trial area in Barker v. Wingo, supra.

The Indiana courts are even stronger on this point regarding the waiver of constitutional rights by juveniles. In Indiana, a waiver can only be made after consultation with a parent or guardian. In Louis v. State, 288 N.E.2d 138 (1972), the Indiana Supreme Court stated:

> It would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their blood, should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign or unfamiliar. 288 N.E.2d at 141-42.

The court went on to state that such constitutional rights cannot be waived unless the juvenile and his parent or guardian are informed of the right and the juvenile chooses to waive the right after consultation with the parent or guardian. See, also, Hall v. State, 346 N.E.2d 584 (1976) and Williams v. State, 433 N.E.2d 69 (1982). In Hall, the court stated:

> The record must affirmatively demonstrate that the juvenile and his parent or guardian were afforded a meaningful opportunity to counsel

together. 346 N.E.2d at 587.

See, also Indiana Code §31-6-7-4, which codifies these principles:

> (A)ny rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver; or (2) by the child's parent, guardian, custodian, or guardian ad litem if: (a) that person knowingly and voluntarily waives the right; (b) that person has no interest adverse to the child; (c) meaningful consultation has occurred between that parent and the child; (d) the child knowingly and voluntarily joins with the waiver; (3) the child may waive his right to meaningful consultation under subdivision (a) (2) (c) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or attorney, and if the waiver is made knowingly and voluntarily.

The record in this case is

completely devoid of any indication that the 14 and 15 year old defendants had been informed of their right to a speedy trial and knowingly and voluntarily waived or acquiesced in the 17-month delay prior to trial. This is underlined and adequately illustrated by the fact that under Indiana Criminal Rule 4(a), any defendant who remains incarcerated has a right to demand a trial within 70 days. Under Criminal Rule 4(b) any defendant who remains incarcerated for six months prior to trial has an absolute right to be released on his own recognizance, although he may be brought to trial within one year as mandated by Criminal Rule 4(c). In the present case, the child defendants remained incarcerated for 17 months prior to trial. Their attorneys never asserted any speedy trial right on their behalf

and it is inconceivable that the defendants would not avail themselves of their right to be released on their own recognizance after six months of incarceration prior to trial. Further, since the trial took place more than one year after the charges, the Petitioners had a right to discharge (dismissal of the charges) under Rule 4. This also was not pursued by prior counsel.

Accordingly, if the Court does not choose to reach the merits of the speedy trial claim (as argued below) the case must be remanded for a determination as to whether the Petitioners knew of their right to a speed trial and acquiesced in the delay prior to trial within their rights as afforded by the Indiana Statutes and Rules, the Indiana Constitution, and the Constitution of the United States.

Constitution, and the Constitution of the United States.

IV.

The Seventh Circuit Erred in its Substantive Determination that the Petitioners had not Been Denied Their Sixth Amendment Right to a Speedy Trial

The Indiana Supreme Court made the following findings:

> Defendants argued very forcefully that they were severely prejudiced by the delay. During their incarceration they matured in age, height, weight, so that at the time of trial they perfectly matched the prosecutrix's descriptions of her assailants. At the time of the incident, Defendants were two years younger, and each were approximately six inches shorter, and 40 pounds lighter. Also at trial, Defendant Harper's alibi witnesses could not remember the exact date upon which he had been in a fight and had sustained a very noticeable injury to his mouth. The Prosecutrix admitted she was close enough to her assailants to see their faces but she did not see any bruise or notice anything unusual on their

> faces. Additionally, she testified that her memory of the event had improved with time and that she was more certain of her assailants' identities at trial. 433 N.E.2d. at 1177.

Like the Seventh Circuit, however, the Indiana Supreme Court suggests that the continuances were had with the knowledge and agreement of Defendants and at the behest of defense counsel, "for personal reasons."

As noted above, counsel for the Petitioners are unable to find any reference in the record to knowledge and waiver on the part of the Defendants and the State did not raise this claim either in their brief to the Supreme Court of Indiana or in their brief to the Seventh Circuit Court of Appeals.

Notwithstanding the knowledge and waiver questions, the Seventh Circuit opinion fails to take into consideration

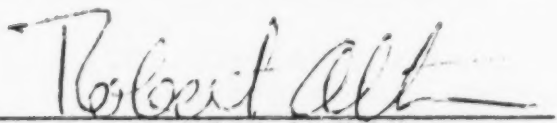
the factors which are mandated by this Court's jurisprudence.

Considering the 17 months these children spent incarcerated and the clear prejudice sustained during this time, it is respectfully suggested that the Seventh Circuit's analysis fails the test announced in Barker v. Wingo, supra. Accordingly, it is respectfully suggested that certiorari be granted and the case reversed.

CONCLUSION

For the foregoing reasons, the Petitioners, Keith Dean and Cornelius Harper, respectfully pray that the Court accept certiorari and determine the case on the merits.

Respectfully submitted,
AXAM ALTMAN & McINTYRE, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Petition for Writ of Certiorari upon counsel for the opposing party by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at his post office address, as follows:

David A. Arthur
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

Dated: This 21 day of December, 1984.

ROBERT ALTMAN

APPENDIX "A"

Seventh Circuit Decision

EDITOR'S NOTE

PAGES 1 thru 10 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-1664, 83-1765

KEITH DEAN and CORNELIUS HARPER,

Petitioners-Appellees-Cross-Appellants,

v.

JACK DUCKWORTH,

Respondent-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-C-340—**Allen Sharp**, *District Judge.*

ARGUED DECEMBER 2, 1983—DECIDED JULY 31, 1984

Before CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge*, and MAROVITZ, *Senior District Judge.**

MAROVITZ, *Senior District Judge.* This is an appeal from an order of the District Court granting Dean and Harper's petition for a writ of habeas corpus. The District Court held that petitioners received ineffective assistance of counsel caused by a conflict of interest on the part of their defense counsel. After a careful review of the record, we reverse.

---

* The Honorable Abraham Lincoln Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

During the early morning hours on September 13, 1977, Lannon Sulkko, a 29-year-old white woman, was abducted from her driveway at gunpoint by two black males. She was driven some distance from her home and then raped in the back seat of what turned out to be an automobile stolen during the evening hours of September 12, 1977. She was robbed of her money and then returned to an area near her house.

In the course of the subsequent police investigation Mrs. Sulkko was shown a number of mug shots as well as photographs from three local high school yearbooks. Outside of the yearbooks, she was shown 39 pictures, 34 of which were in black and white, the remaining five in color. Three of the five color photographs were Polaroid prints. Two of those prints were pictures of the defendants Keith Dean and Cornelius Harper. During the process of viewing the photographs Mrs. Sulkko selected several pictures of individuals who possessed characteristics or features similar to those of her attackers. Among the individuals so selected were Richard Pickett and Larry Harper, older brother of Cornelius Harper. The pictures of petitioners were the only ones that Mrs. Sulkko picked out as actually portraying the attackers. No identification line-up was ever conducted, apparently because the petitioners were juveniles. Mrs. Sulkko did view and identify the petitioners at a juvenile hearing. The petitioners were the only black males in the room at that time.

After their arrests, at the request of their defense attorney, the petitioners submitted to *ex parte* polygraph examinations. The results indicated that one of the petitioners knew something about the incident, but were inconclusive as to the other petitioner.

After a series of delays, mostly attributable to the defense, the petitioners were brought to trial on April 30, 1979. Both were represented by the same attorney. They were found guilty and sentenced to life imprisonment, which at that time was a mandatory sentence for the crime of kidnapping under Indiana law. Two weeks after

the guilty verdict Richard Pickett and Larry Harper told defense counsel that they were the individuals involved in the incident. They admitted stealing the car, but claimed that Mrs. Sulkko consented, and even requested to have sex with them. Larry Harper and Richard Pickett then submitted to *ex parte* polygraph examinations, the results of which indicated that they were telling the truth when they stated that they had sexual intercourse with Lannon Sulkko, and that they were not telling the truth when they stated that it was not by force. A second *ex parte* polygraph examination of the petitioners was then conducted. The results of this examination indicated that they were telling the truth when they stated that they had not engaged in sexual intercourse with Mrs. Sulkko.

Based upon the above information, defense counsel filed a motion to correct errors. Attached to the motion was a transcript of Richard Pickett and Larry Harper's statements as given to defense counsel. At the hearing on the motion Larry Harper testified that he had engaged in sexual intercourse with Mrs. Sulkko, but refused to answer many questions on Fifth Amendment grounds. Richard Pickett refused to answer any questions. Larry Harper did state that he had told both petitioners about the incident the day after it happened. The trial judge denied the motion based upon the fact that the petitioners had failed to produce any "newly discovered evidence". Additionally, the judge noted that under Indiana law, the results of polygraph examinations are inadmissible absent a stipulation between the parties. *Vacendak v. State*, 264 Ind. 101, 340 N.E. 2d 352 (1976). Petitioners then appealed directly to the Supreme Court of Indiana which unanimously affirmed the convictions. *Dean v. State*, 433 N.E. 2d 457 (1982). Having exhausted their available state court remedies, petitioners then filed a petition for habeas corpus relief in the District Court. Nine issues were raised in the petition. The District Court ruled that eight of the issues were "wholly without merit", and then addressed the lone issue of whether the joint representation of the petitioners at trial violated their right to the

effective assistance of counsel. After reviewing the record, the District Court reached the conclusion that petitioners' counsel had an actual conflict of interest that adversely affected his performance and therefore issued the writ. Respondent Duckworth appeals from this decision while petitioners cross-appeal from the District Court's decision that the other eight issues raised in the petition were wholly without merit.

I

The Sixth Amendment to the United States Constitution guarantees to a defendant counsel that is unimpaired by a conflict of interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942). Of course, the mere fact that two or more defendants are jointly represented by a single attorney is not a *per se* violation of this constitutional guarantee. "To establish a constitutional violation, a defendant who raised no objection 'at trial must demonstrate that an actual conflict of interest adversely affected his lawyers' performance.' " *Wilson v. Morris*, 724 F.2d 591, 593 (7th Cir. 1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

Neither petitioners nor their trial counsel objected to proceeding to trial without separate counsel. Nor did trial counsel ever indicate to the court that he foresaw the possibility of a conflict of interest. Thus, under *Cuyler* it was incumbent upon petitioners to establish the existence of an actual conflict of interest and that the conflict adversely affected the performance of their trial attorney.

In reaching the conclusion that a constitutional violation occurred the District Court did not specifically delineate the actual conflict of interest. Instead, relying upon *United States ex rel. Sullivan v. Cuyler*, 553 F. Supp. 1236, 1242 (E.D. Pa. 1982), the Court stated that the concepts of actual conflict and adverse affect were merged and that an actual conflict adversely affecting counsel's performance appears on the face of the record. The basis

for this statement is the District Court's conclusion that the petitioners did not in fact have a joint defense. At trial both petitioners testified that they spent the evening of September 12, 1977 together and among friends, but that each had already gone to his own respective home by the time that the kidnap, rape and robbery occurred. Thus, the District Court reasoned that because petitioners did not claim to have spent the entire night of September 12-13, 1977 together, their alibis ceased to be joint at precisely the most critical juncture in their defense.

While we agree that petitioners' alibi defense may have ceased to be joint at the time they left each other's company, we do not agree that this, by itself, establishes that an actual conflict of interest adversely affected their attorney's performance. Petitioners both testified that they spent the evening of September 12th together at a friend's house. Petitioners, the friend and the friend's mother all testified that they specifically remembered that day because Cornelius Harper had injured his lip in a fight on a school bus earlier that afternoon. This alibi, and with it the credibility of petitioners and their witnesses, was destroyed by the testimony of Harper's high school principal who stated that the injury to Harper's lip occurred not on September 12th but five days earlier. Petitioners now argue that this impeachment of Harper's alibi created prejudice in the minds of the jurors against Dean, and that defense counsel should have asked for an instruction that the principal's testimony be admitted against Harper only but was unable to do so because he was also representing Harper. This argument is totally without merit. Both Harper and Dean, as well as their supporting witnesses, testified that Harper injured his lip on September 12th. Dean actually described the fight in some detail. Thus the impeachment testimony was certainly admissible against both petitioners. Nowhere in our review of the record have we discovered any characteristics of a conflict of interest. We found no action or inaction by defense counsel that was favorable to one defendant at the expense of the other. *Cuyler v. Sullivan*, 446 U.S. 335

(1980). All of the evidence presented by the prosecution was offered against both petitioners. There was nothing presented that would implicate one more than the other thereby putting defense counsel into the position of having to choose the interest of one over the other. We reject the conclusion inherent in the District Court's opinion that because petitioners did not have identical defenses they necessarily had conflicting defenses. In short, we find no evidence of any actual conflict of interest or any adverse affect upon trial counsel's performance.

II

Having determined that the District Court erred in concluding that petitioners' trial counsel acted under a conflict of interest, we must now review the eight claims for relief raised in the petition for habeas corpus which the District Court dismissed as wholly without merit. We agree that these issues are without merit but for purposes of clarity will address petitioners' claims that they were denied a speedy trial and that they were denied due process of law when the prosecutor refused to stipulate to the admission of the polygraph results and when the court refused to grant use immunity to Richard Pickett and Larry Harper.

The Sixth Amendment guarantees a defendant a right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972). To determine whether there has been a violation of that right, the court must consider the length of the delay, the reason for the delay, the defendant's assertion of his right and the prejudice to the defendant. *Id.* at 530.

The record in this case reveals that petitioners were incarcerated for 17 months prior to trial. At no time during those 17 months did petitioners or their counsel attempt to assert their right to a speedy trial. The reason is apparent. The vast majority of the delays and continuances were had with the knowledge and agreement of the petitioners and at the request of their counsel. The initial delays were the result of counsel's difficulties in ob-

taining a transcript of the juvenile waiver hearing, and because counsel felt that he was not prepared for trial. Later, due to eye surgery he was unavailable for trial. When counsel's recovery took longer than expected his partner was called into the case with petitioners' approval.

Petitioners now argue that they were severely prejudiced by the long delay. When arrested they were 14 and 15 years old and weighed 40 pounds less and were 6 inches shorter than when they went to trial. Immediately after the incident Mrs. Sulkko indicated that her attackers were around 17-20 years of age and were 5 feet 6 inches to 5 feet 7 inches in height. At the time of the arrest Dean's height was 5 feet 1 inch and Harper's was 5 feet 4 inches. Thus, petitioners argue that during pre-trial incarceration they actually grew into the description given by Mrs. Sulkko. However, at trial Mrs. Sulkko testified that the original description taken down by the investigating officer was in error as to the height and ages of her assailants and that she explained this to the investigating detective the following day. Detective Mitchell's testimony corroborated Mrs. Sulkko's on this point.

In our opinion, the fact that petitioners never asserted their right and that the delays and continuances were had with their knowledge and at their attorney's request outweighs any possible prejudice created by the delay. In this regard we note that the prejudice was minimized by defense counsel when he had the petitioners' heights measured shortly after their incarceration.

Finally, petitioners maintain that they were denied due process of law when the prosecutor refused to stipulate to the admission of the polygraph results and when the court refused to grant use immunity to Richard Pickett and Larry Harper. As noted previously, the polygraph results were offered to the court in a motion to correct errors based upon newly discovered evidence. The court refused to accept the results into evidence because they were inadmissible under Indiana law absent a stipulation or waiver. The court also ruled that they were not new-

ly discovered evidence based on Larry Harper's statement that he had told both petitioners about the incident the day after it happened. The petitioners now argue that the failure of the prosecution to enter into a stipulation violated the due process clause and denied them a fair trial. They rely on this Court's opinion in *McMorris v. Israel*, 643 F.2d 458 (7th Cir. 1981). In *McMorris* we held that a prosecutor's refusal to enter into a written stipulation with respect to the admission of exculpatory polygraph evidence without giving reasons for the refusal may violate the due process clause because of the potential for abuse by the prosecution. Thus, a prosecutor may refuse to enter the stipulation only for justifiable reasons. *Id.* at 464. In the instant case, the prosecution refused to enter into a stipulation because the State of Indiana does not recognize the reliability of polygraph evidence. In *McMorris* we noted that our decision was closely linked to the peculiarities of the Wisconsin stipulation rule. The Wisconsin Supreme Court decision that enunciated the stipulation rule, *State v. Stanislowski*, 62 Wis. 2d 730, 216 N.W. 2d 8 (1976), adopted the premise that polygraph examinations have become more reliable and have achieved such a degree of scientific recognition that their unconditional rejection is no longer appropriate. *Id.* at 741. Petitioners have presented no authority, and we have found none, to suggest that Indiana has also adopted this premise. Indeed, our research leads to the contrary conclusion. *See Minneman v. State*, 441 N.E. 2d 673, 678 (1982). Thus, *McMorris* is inapplicable because unlike Wisconsin, Indiana has not recognized the reliability of polygraph evidence. Additionally, even if *McMorris* was applicable, the polygraph results would not have warranted the granting of a new trial because the trial judge found that they did not represent newly discovered evidence as required by Indiana law. *Vacendak v. State*, 298 N.E. 2d 867, 871-72. A defendant in possession of evidence who fails to present it at trial may not thereafter use it as a basis for a new trial. *Riddle v. State*, 402 N.E. 2d 958, 961 (1980).

Petitioners also maintain that they were denied due process of law when the court refused to grant Richard Pickett and Larry Harper use immunity. They have presented virtually no support to establish that the court actually had the authority to grant their request. We have repeatedly held that immunization is a prerogative of the Executive Branch of government and not the Judicial Branch. *United States v. Flomenhoft*, 714 F.2d 708 (7th Cir. 1983). Further, the federal immunization statutes were not designed to protect defendants. *United States v. Frans*, 697 F.2d 188 (7th Cir. 1983). Thus, if petitioners had been tried in federal court the judge would have had no authority to grant or even request immunization. *Id.* We have found no authority suggesting that Indiana courts have some sort of inherent power to grant immunization to defense witnesses. Nor have petitioners presented any evidence that the prosecutor clearly abused his discretion in refusing to grant immunity, thereby violating the due process clause. There has been no showing of bad motives on the part of the prosecutor or that he intended to distort the fact-finding process. Additionally, everything that Richard Pickett and Larry Harper would have testified to was already before the court in the form of exhibits attached to the motion to correct errors. The court examined the exhibits and thus had the opportunity to review any exculpatory evidence. Again, as with the polygraph results, Richard Pickett and Larry Harper's testimony would not have constituted newly discovered evidence and under Indiana law would not have been sufficient to support the granting of a new trial.

Conclusion

Our review of the record leads us to conclude that petitioners' counsel did not encounter an actual conflict of interest that adversely affected his performance and we therefore reverse the District Court's decision on that issue. Further, despite the excellent and vigorous efforts by petitioners' present counsel to persuade us otherwise,

we agree with the District Court that the other eight claims raised in the petition are without merit. The decision of the District Court issuing the writ of habeas corpus is reversed.

REVERSED.

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Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX "B"

Denial of Motion for Rehearing
and Suggestion for Rehearing
En Banc

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

CORRECTED OCTOBER 23, 1984
October 22, 1984.

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. ABRAHAM L. MAROVITZ, Sr. District Judge*

KEITH DEAN and CORNELIUS HARPER,
Petitioners-Appellees,
Cross-Appellants,

v.

JACK DUCKWORTH,
Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-C-340
Allen Sharp, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioners Keith Dean and Cornelius Harper, no judge in active service has

requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable Abraham Lincoln Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.